

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	
)	
)	ORDER
IN RE:)	
)	Case No. 2008-2
Protest of South Carolina Ass'n)	
of the Deaf)	
Appeal of South Carolina Ass'n)	
of the Deaf)	

This matter came before the South Carolina Procurement Review Panel (Panel) by way of an appeal letter from the South Carolina Association of the Deaf (SCAD) dated April 18, 2008, requesting administrative review of the Chief Procurement Officer's (CPO's) dismissal of its protest as untimely in his April 10, 2008, decision. On April 22, 2008, the CPO filed a motion to dismiss the appeal before the Panel for lack of jurisdiction. After receiving briefs from the parties, the Panel now issues this order without conducting a hearing based on the threshold issue of jurisdiction as determined from the undisputed facts of the case together with established law.

Findings of Fact

On January 4, 2008, the Information Technology Management Office (ITMO) issued an invitation for bids (IFB) on behalf of the Office of Regulatory Staff (ORS). The IFB was for the procurement of real time closed-captioning services for news broadcasts in the four major media markets in South Carolina. The IFB set a question deadline of January 18, 2008, and a bid opening date of January 31, 2008. On January 28, 2008, ITMO issued Amendment 1 to the IFB, which addressed eleven questions received from bidders and extended the bid opening deadline to February 14, 2008. On February 12, 2008, ITMO issued Amendment 2 to the IFB, which answered two follow-

up questions to new information in Amendment 1 and declined to answer four other questions as they related to the original solicitation and were received after the January 18th deadline. Amendment 2 did not change the bid opening date of February 14, 2008. On February 13, 2008, SCAD filed its protest with the CPO.

Conclusions of Law

To protest the specifications of an IFB, an aggrieved prospective bidder “shall protest to the appropriate chief procurement officer . . . within fifteen days of the date of the issuance of the Invitation for Bids . . . or any amendment to it, if the amendment is at issue.” S.C. Code Ann. § 11-35-4210(1)(a) (Supp. 2007). The computation of time under the Procurement Code is as follows:

“Days” means calendar days. In computing any period of time prescribed by this code or the ensuing regulations . . . the day of the event from which the designated period of time begins to run is not included. If the final day of the designated period falls on a Saturday, Sunday, or a legal holiday for the state or federal government, then the period shall run to the end of the next business day.

S.C. Code Ann. § 11-35-310(13) (Supp. 2007). The IFB was issued on January 4, 2008, and fifteen days from January 4, 2008, is January 19, 2008, which is a Saturday and not counted. Therefore, to protest the general specifications of the IFB, SCAD needed to file a protest on January 21, 2008. ITMO issued Amendment 1 on January 28, 2008. Fifteen days from January 28, 2008, is February 12, 2008. Thus, to protest Amendment 1, SCAD needed to file a protest on February 12, 2008. However, SCAD’s protest was not filed until February 13, 2008 – forty days after the IFB was issued and sixteen days after Amendment 1 was issued.

Before the CPO, SCAD sought to excuse its untimely protest by claiming that it delayed filing its protest in the hopes that it could persuade the State to use more

subjective and less competitive award criteria through the question and answer process.¹ Additionally, in its brief to the Panel, SCAD argues that its protest was timely because it was filed within one day of the issuance of Amendment 2. SCAD contends that it was merely following the question and answer procedure established by the State – its first questions were filed before the January 18th deadline and were addressed in Amendment 1. SCAD also points out that two of its follow-up questions to Amendment 1 were allowed by the State and answered in Amendment 2. Finally, SCAD argues that the basis for its protest is the State’s refusal to answer its other follow-up questions to Amendment 1.

The Panel has repeatedly ruled that the time for filing a protest is jurisdictional and cannot be waived by the conduct or consent of the parties. *See, e.g., In re: Protest of Oakland Janitorial Services, Inc.*, Case No. 1988-13; *In re: Protest of National Cosmetology Ass’n*, Case No. 1996-17; *In re: Protest of Jones Engineering Sales, Inc.*, Case No. 2001-8. The Panel has also ruled that, under section 11-35-4210(1)(a), an amendment “would only be ‘at issue’ if it provided new or different information than the solicitation documents. Otherwise, the fifteen days for protesting the solicitation would be extended by any amendment issued.” *In re: Protest of Mechanical Contractors Ass’n of S.C.*, Case No. 1995-12.

SCAD’s insistence that its protest was filed within one day of the issuance of Amendment 2 is unavailing. First, its original protest grounds all refer to Amendment 1,

¹ While not essential to its decision, the Panel notes that the CPO spent a considerable amount of time in his decision discussing the State’s prerogative in determining which source selection method to use in its various solicitations. The Panel agrees with the CPO that the decision to use an RFP rests in the sole discretion of the purchasing agency, and that, absent an exercise of that discretion choosing an RFP, an IFB is required by S.C. Code Ann. section 11-35-1510 (Supp. 2007).

not Amendment 2. As noted above, the deadline for filing a protest of Amendment 1 was February 12, 2008, and SCAD's protest was not filed until February 13, 2008. Therefore, by the very terms of its stated protest grounds, SCAD's protest is untimely.

Moreover, a close reading of SCAD's follow-up questions to Amendment 1 and its protest grounds reveals that the questions that the State did not answer in Amendment 2 all related to the original IFB specifications, not to new information contained in Amendment 1. Finally, the fact that the State did answer two questions in Amendment 2 that related to new information contained in Amendment 1 did not extend the time for protest of the remaining questions because those questions all related to the original IFB specifications. Therefore, the Panel finds that SCAD's explanations are an impermissible attempt to extend the applicable protest period by claiming that its protest relates to an amendment and not the original IFB specifications.

For the foregoing reasons, the Panel finds that SCAD's protest is untimely filed, and, as such, the Panel does not have jurisdiction to consider it. Accordingly, the CPO's motion to dismiss the protest is granted.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL
BY ITS CHAIRMAN:



J. Phillip Hodges, Jr.
Chairman

Columbia, South Carolina

This 17th day of June, 2008.